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SUSPENSION OF THE HABEAS CORPUS IN STRIKES.

ORIGIN OF THE WRIT.

"SINCE the origin of society, each unit of our race has struggled on in his allotted part, through joys and griefs, fashioned for the most part, by the invisible network of habits, customs, and statutes which surround him on every side, and silently shape his daily actions. Thus the history of jurisprudence becomes the history of the life of man, and the society of distant ages is more distinctly presented in the crabbed sentences of codes than in the flowing rhetoric of the historian. * * * The law giver and the law dispenser are the custodians of all that we hold dear on earth. Save the ministers of God, what human being can have interests so vital confided to him, or can exercise so momentous an influence over his fellow men?" [1]

The writ of habeas corpus, the crystalization of the freedom of the individual, reflects in itself the arduous struggle of a liberty-loving people against tyrannical autocracy. Every musty line sums up broken lives, effort, blood and tears expended in vindication of a principle. In its compass the unique ideals and traditions of a great race, ideals and traditions "made perfect through suffering," take settled and definite form. Giving expression, as it does, to rights which continuously secure the liberty of every law-abiding citizen, the writ has become a part of our organic law and has been taken for granted so long that its sanguinary history, epitomizing the Anglo-Saxon idea of the relation to man to his government, has passed out of common knowledge.

[1] Wager of Law, by Henry C. Lea (Phila. 1866).

If his mind ever adverts to it at all the casual layman is apt to think of the great writ as something that in a vague and mysterious way is reputed to form the basis of all civil liberty. How, or why, he knows not—no more than he knows the literal significance of the words employed.

Since time immemorial the right of every citizen to be exempt from imprisonment except for cause has been recognized among the Anglo-Saxons, the peculiar characteristic of whose laws and government has always been the freedom of the individaul as opposed to the political and collective freedom of other peoples.[2] The right was recognized in theory but ignored in practice by various English kings. Culminating with the Stuarts the outrages perpetrated on the theory that "the king can do no wrong" resulted finally in the passage in 1679 of a writ,[3] the practical effect of which is that every citizen is "protected by judicial action from unlawful imprisonment." [4]

The immediate occasion of its passage has been ascribed to the incarceration of an obscure person, Jenkes by name, who had been imprisoned on the order of King Charles II for publicly urging that the King be petitioned to call a Parliament.[5] Lord Campbell, however, points out that the Jenkes episode occurred in 1666 and the Habeas Corpus Act was not passed till 1679,[6] Jenkes' illegal imprisonment having meanwhile been forgotten in the turmoil attendant upon the Popish Plot and other agitations of the times.[7] Lord Shaftesbury, the author of the act, had himself been imprisoned several times without legal cause, and it is more reasonable to believe what he was moved more by his own experiences than by those of others. Lord Campbell so states the fact to be, Shaftesbury's attention having been partic-

[2] Hare, Am. Const. Law, 892.

[3] 31 Car. II, Ch. 2.

[4] Ex parte Yerger, 8 Wall 85, 19 L. Ed. 332.

[5] McLeod's Case, 3 Hill 647.

[6] It is a rather singular circumstance that in his argument in the celebrated Milligan Case, 71 U. S. 2, 18 L. Ed. 281, Gen. Garfield states that the Habeas Corpus Act was passed during the reign of William and Mary in 1688. He evidently meant the Bill of Rights prohibiting the suspension of the law in question.

[7] 3 Campbell's Lives of Lord Chancellors, 276 (2nd London ed.).

ularly drawn to the subject by the charges against Lord Clarendon as well.[8]

The manner of the passage of the act is interesting, and demonstrates that in legislative methods we have not outdone our ancestors. Lord Shaftesbury had introduced into Parliament between 1668 and 1678 four different measures partially covering the ground included in the Habeas Corpus Act. In each case the bill had passed the Commons and been defeated by the Lords. The first stage of the Habeas Corpus Act was the same—it passed the Commons. Shaftesbury managed to have it carried in the Lords on the first two readings, but its defeat was regarded as certain on third reading. It is reputed to have passed by accident in the following manner:

> "According to Bishop Burnet, 'Lords Grey and Norris were named to be tellers. Lord Norris being a man subject to vapours, was not at all times attentive to what he was doing. So a very fat lord coming in, Lord Grey counted him for ten, as a jest at first; but seeing Lord Norris had not observed it, he went on with his misreckoning of ten, so it was reported to the House, and declared that they who were for the bill were the majority, though it indeed went on the other side.'
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> "The majority being declared from the Woolsack in favor of the bill, Shaftesbury perceived a great commotion among the courtiers at a result so little expected on either side. With much presence of mind he instantly started on his legs, and after speaking near an hour, during which many members entered and left the House, concluded with a motion on some indifferent subject. It was now impossible that the House could be retold, and no further question could be made upon the bill in the Lords." [9]

For a long time the law was called 'Lord Shaftesbury's Act.'[10]

Today the practical effect of Shaftesbury's unscrupulous efforts is that imprisonment except for legal cause, till within twenty years, was unknown, and the writ of habeas corpus is not only part of our organic law for its own sake but it makes effective other constitutional guaranties.

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[8] *Ibid.* [9] *Ibid.* [10] *Ibid.*

CONSTITUTIONAL PROVISION INVOLVED.

Within the last twenty years an insidious doctrine has sprung into being, the mongrel offspring of civil discord and the expediency attendant thereon. This doctrine concerns the suspension of the writ [11] in cases in which the chief executive of a state has been confronted with industrial disturbances of a character so serious that he has deemed it necessary to call out the military power of the state for the suppression of lawlessness. The declaration of so-called martial law is involved as a necessary accompaniment. The courts are not in accord as to the right of the executive to make this declaration under such circumstances, nor do they agree as to what is meant by martial law. The question is one of vital importance because of our increasing industrial complications. The law must adapt itself to social and economic conditions if it is to endure. That the law itself is adequate, there can be no doubt. It is the strained construction put upon it by some courts that is at fault. When the impression becomes prevalent that the law is being used as an instrument of social injustice its usefulness is impaired if not nullified as an effective agency of law and order. The essential fact to be borne in mind *is the justice of the arrest of the individual,* which fact must be made apparent, if law enforcement is to have the support of public opinion in the connection under discussion. One or two concrete examples of injustice to the individual are of more weight than numberless general theories. The orderly process of law never excites the resentment that a lynching does, yet the actual result to the individual may be identical. Law is, of course, a social science. As long as our ideal of free government exists as it is, a suspension of the habeas corpus is a great deal like tying down a safety valve.

In every case in which the right to suspend the writ has been sustained the decision of the court has been placed upon alleged constitutional grounds and upon stern necessity, the mother of

[11] Technically suspension of the writ does not suspend the writ itself. The writ issues as a matter of course and on its return the court decides whether the applicant is denied the right of proceeding further. Ex parte Milligan, 71 U. S. 2, 18 L. Ed. 281; Bailey on Habeas Corpus, 448.

bad law. Unquestionably the task of the courts has not been an easy one, as they have been confronted in one and the same controversy with constitutional provisions apparently contradictory. I have taken as typical the provisions of the Colorado Constitution which are contained in substance in the constitution of practically every state in the union. They are as follows:

> "That the privilege of the writ of habeas corpus shall never be suspended, unless when in case of rebellion or invasion, the public safety may require it." [12]
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> "The governor shall be commander in chief of the military forces of the state, * * * He shall have the power to call out the militia to execute the laws, suppress insurrection or repel invasion." [13]

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[12] Constitution of Colorado, Art. II, § 21. Similar constitutional provisions: Alabama, Art. I, § 18; Arkansas, Art. II, § 11; Connecticut, Art. I, § 14; Delaware, Art. I, § 13; Florida, Art. I, § 6; Georgia, Art. I, § 13; Idaho, Art. I, § 5; Illinois, Art. II, § 7; Indiana, Art. I, § 27; Iowa, Art. I, § 13; Kansas, Bill of Rights, Art. 8; Kentucky, Art. XIII, § 18; Louisiana, Art. I, § 7; Maine, Art. I, § 10; Maryland, Art. III, § 55; Massachusetts, Art. VI, § 7; Michigan, Art. IV, § 44; Minnesota, Art. 1, § 7; Mississippi, Art. I, § 3; Missouri, Art. II, § 26; Montana, Art. III, § 21; Nebraska, Art. I, § 8; Nevada, Art. I, § 5; New Jersey, Art. I, § 11; New Mexico, Art. II, § 7; New York, Art. I, § 4; North Carolina, Art. I, § 21; North Dakota, Art. I, § 5; Ohio, Art. I, § 8; Oklahoma, Art. II, § 10; Oregon, Art. I, § 24; Pennsylvania, Art. I, § 14; Rhode Island, Art. I, § 9; South Carolina, Art. I, § 17; South Dakota, Art. VI, § 8; Tennessee, Art. I, § 15; Texas, Art. I, § 12; Utah, Art. I, § 5; Vermont, Amend. XII; Virginia, Art. V, § 14; Washington, Art. I, § 13; Wisconsin, Art. I, § 8; Wyoming, Art. I, § 17; United States, Art. I, § 9 (2).

[13] Constitution of Colorado, Art. IV, § 5. Similar constitutional provisions: Alabama, Art. IV, § 18; Arkansas, Art. VI, § 6; Arizona, Art. V, § 3; California, Art. V, § 5; Connecticut, Art. IV, § 5; Delaware, Art. III, § 7; Florida, Art. VI, § 4; Georgia, Art. IV, § 2; Idaho, Art. IV, § 4; Illinois, Art. V, § 14; Indiana, Art. V, § 12; Iowa, Art. IV, § 7; Kentucky, Art. III, § 8; Louisiana, Art. III, § 59; Maine, Art. V, § 1; Maryland, Art. II, § 8; Massachusetts, Art. II, § 17; Minnesota, Art. V, § 4; Mississippi, Art. V, § 5; Missouri, Art. V, § 7; Montana, Art. VII, § 6; Nebraska, Art. V, § 14; Nevada, Art. V, § 5; New Hampshire, Art. II, § 51; New Jersey, Art. V, § 6; New Mexico, Art. V, § 4; New York, Art. IV, § 3; North Carolina, Art. III, § 8; North Dakota, Art. III, § 75; Ohio, Art. III, § 10; Oklahoma, Art. VI, § 6; Oregon, Art. V, § 9; Pennsylvania, Art. IV, § 7; Rhode Island, Art. VII, § 3; South Carolina, Art. III, § 10; South Dakota, Art. IV, § 4; Tennessee, Art. III, § 5; Texas, Art. IV, § 7; Utah, Art. VII, § 5; Washington, Art. III, § 8; West Virginia, Art. VII, § 12; Wisconsin, Art. V, § 4; Wyoming, Art. IV, § 4.

"That the military power shall always be in strict subordination to the civil power." [14]

The foregoing provisions are the ones which are primarily in question. Incidental thereto and dependent for their effectiveness thereon are other provisions contained in all state constitutions, guaranteeing a speedy remedy for injury to person, property or character; protection from deprivation of life, liberty or property without due process of law; speedy public trial by jury in criminal prosecutions, etc.

While it is desirable to limit this discussion to those instances in which industrial disturbances are specifically dealt with, it is necessary to consider other cases with a wider bearing for the purpose of establishing the proper premises. The large volume of these latter cases arising from conditions of actual warfare will be considered only as they are applicable to various phases of the particular question. Certain propositions must first be made clear before taking up a discussion of the main topic.

The Suspension of the Writ of Habeas Corpus Is a Legislative Function.

"That the privilege of the writ of habeas corpus shall never be suspended, unless when in case of rebellion or invasion, the public safety may require it."[15]

We are at the outset confronted with the fact that provision

[14] Constitution of Colorado, Art. II, § 22. Similar constitutional provisions: Alabama, Art. I, § 28; Arkansas, Art. II, § 27; Arizona, Art. II, § 20; California, Art. I, § 12; Connecticut, Art. I, § 18; Delaware, Art. I, § 17; Florida, Art. I, § 13; Idaho, Art. I, § 12; Illinois, Art. II, § 15; Indiana, Art. I, § 33; Iowa, Art. I, § 14; Kentucky, Art. XIII, § 26; Louisiana, Art. VI, § 125; Maine, Art. I, § 17; Maryland, Decl. Rts., Art. 30; Massachusetts, Part I, § 17; Michigan, Art. XVIII, § 8; Minnesota, Art. I, § 14; Mississippi, Art. I, § 25; Missouri, Art. II, § 27; Montana, Art. III, § 22; Nebraska, Art. I, § 17; Nevada, Art. I, § 11; New Hampshire, Art. I, § 26; New Jersey, Art. I, § 12; New Mexico, Art. II, § 9; North Carolina, Art. I, § 24; North Dakota, Art. I, § 12; Oklahoma, Art. II, § 14; Oregon, Art. I, § 28; Pennsylvania, Art. I, § 22; Rhode Island, Art. I, § 18; South Carolina, Art. I, § 28; South Dakota, Art. VI; Texas, Art. I, § 24; Utah, Art. I, § 20; Vermont, Art. I, § 16; Virginia, Art. I, § 15; West Virginia, Art. III, § 12; Wisconsin, Art. I, § 20; Wyoming, Art. I, § 25.

[15] See note 12, *supra*.

is made for the suspension of the writ under certain specific circumstances, i. e., rebellion or invasion, and then only if the public safety requires. The question is, who shall determine when the public safety requires the suspension of the writ?

Under the almost identical wording of the United States Constitution [16] it has been held in no uncertain terms that the suspension of the writ is a purely legislative function.[17]

Brevity forbids an elaborate exposition of the principle. The words of Chief Justice Taney in reference to the contention that the President could suspend the writ summarize the law:

> " * * * I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of Congress." [18]

The authorities cited in the footnotes amply sustain the principle without dissent.

The positive holdings to this effect seem to have been influenced by a dictum of Chief Justice Marshall,[19] and an inference by Justice Story.[20] These holdings were followed by the Supreme Courts of those states which had occasion to consider this question.[21]

> " * * * it has been the settled law of this country ever since 1907 that the suspension of the writ of habeas corpus is a legislative and not an executive function." [22]

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[16] That the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it. U. S. Const. Art. I, § 9.

[17] Ex parte Merryman, Taney 246, 256; Ex parte Benedict (1862), 3 Fed. Cas. 1292. See also McCall *v.* McDowell (1867), Deady 233, 255.

[18] Ex parte Merryman, Taney 246, 256, 17 Fed. Cas. 144, 148.

[19] Ex parte Bollman, 4 Cranch 73, 2 L. Ed. 554.

[20] Story on Const., § 1342.

[21] In re Kemp (1863), 16 Wis. 377; Griffin *v.* Wilcox (1863), 21 Ind. 370, 384; Wright *v.* Johnson, 5 Ark. 687, 688; Ex parte McDonald (1914), 49 Mont. 454, 143 Pac. 947, 951.

[22] Ex parte McDonald, 49 Mont. 454, 143 Pac. 947, 951, citing Ex parte Bollman, 4 Cranch 75, 2 L. Ed. 554; Ex parte Merryman, Taney 246, 17 Fed. Cas. 144; Ex parte Milligan, 71 U. S. 2, 18 L. Ed. 281; Johnson *v.* Duncan, 3 Mart. O. S. (La.) 530, 6 Am. Dec. 675; Ex parte Benedict, 3 Fed. Cas. 159; McCall *v.* McDowell, 15 Fed. Cas. 1235; In re Kemp, 16 Wis. 360; Ex parte Moore, 64 N. C. 806.

The decisions in the various courts were based on the propositions that "if the privilege of the writ is granted by law it requires a law to suspend that privilege, and the executive department cannot legislate;" [23] that "if the high power over the liberty of the citizen was intended to be conferred on the President it would undoubtedly be found in plain words in this article," (dealing with executive department; [24] and that the liberties of the citizen are too precious to be placed in the power of any one man). "If the President of the United States may suspend the writ, then the Constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen than the people of England have thought safe to entrust to the crown; a power which could not have been lawfully exercised by the sovereign even in the reign of Charles the First." [25]

It is worthy of remark that practically all of the decisions cited occurred during the troublous period of the Civil War.[26] If in those parlous times of actual warfare and bitter civil dissension the courts upheld the right of legislative departments to suspend the writ of habeas corpus, it is only fair to assume that in cases of industrial disturbances, local in character and of temporary nature, the same sound principles should apply. During the entire history of the United States since the adoption of the Constitution the suspension of the writ has been authorized nationally but once, and that by a specific act of Congress in 1863,[27] because of the conditions growing out of the Civil War.

President Jefferson in 1807 requested Congress to confer that power upon him in the presence of the Burr conspiracy, but his request met with adverse action in Congress. In the public debate on the question Mr. Burwell of Virginia said that there

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[23] In re Moyer, 35 Colo. 159, 179, dissenting opinion of Justice Steele.

[24] Ex parte Merryman, Taney 246, 258, 17 Fed. Cas. 144, 149.

[25] Ex parte Merryman, Taney 246, 265, 17 Fed. Cas. 144, 151. "Parliament only can authorize the crown by suspending the writ of habeas corpus for a short and limited time to imprison suspected persons without giving any reason for so doing." 1 Blks. Com. 136.

[26] See Ex parte Field (1862), 5 Blatch. 63.

[27] Act of Congress, March 3, 1863.

had already been two insurrections [28] in the United States both of which had defied the authority of Congress and menaced the Union with dissolution, and in one of them 15,000 men had been called out. Nevertheless he had never heard of a proposition to suspend the writ of habeas corpus. "Nothing but the most imperious necessity would excuse us in confiding to the executive or any person under him, the power of seizing and confining a citizen, upon bare suspicion, for three months, without responsibility for abuse of such unlimited discretion." [29] These instances are alluded to in order to beget an appreciation of the nature of emergency that might justify suspension of the writ. We are softer today and more easily scared. Hence the sort of thing that failed to frighten our fathers may be instructive.

The "imperious necessity" alluded to is recognized, however, and furnishes its own excuse for the suspenion of the writ.[30] If, as is admitted, occasions arise when necessary action is such that its legitimate purpose would be foiled by awaiting legislation, then let necessity be the sole excuse, and the rights of the citizen will at least be untrammeled by judicial decision. Necessity in the eyes of all authorities is the *only* reason for the suspension of the writ. Viewing the matter as a whole the true conception of the law which not only preserves the liberty of the citizen but serves necessity when she demands it, would appear to be that "when necessity gives the right, legislation is superfluous; when it does not, the right cannot be conferred legitimately by Congress," [31] much less by the Executive.

LIMIT OF THE POWER OF THE EXECUTIVE.

"The Governor shall be Commander in Chief of the military force of the State * * * he shall have power to call out

[28] Shay's Rebellion and Whiskey Rebellion.

[29] Annals of Congress, 9th Congress, pp. 402-4, cited by Justice Steele, in dissenting opinion, In re Moyer, *supra*.

[30] 2 Hare, Am. Const. Law, 954, 955; U. S. *v.* Diekelman, 92 U. S. 520, 23 L. Ed. 742. See 12 Columbia Law Rev. 534, article by Prof. Ballantine, of Wisconsin.

[31] 2 Hare, Am. Const. Law, 965. See Mitchell *v.* Harmony, 13 How. 115, 14 L. Ed. 75.

> the militia to execute the laws, suppress insurrection or repel invasion." [32]

Within the limits of the foregoing section is contained the entire measure of the power of the governor in regard to the use of the militia. The phrase "execute the laws" refers to the enforcement of judicial process,[33] and has no place in this discussion.

The section in question does not justify the usages of actual warfare, because war in its legal sense differs from rebellion or insurrection. Congress alone can declare war. The line of demarcation becomes distinct when the rebellion or insurrection takes definite political form.[34]

With this distinction in mind it is obvious that the governor has no power to declare martial law in the sense that it exists in actual warfare; nor has he power to declare martial law in any sense that will result in a suspension of the writ of habeas corpus,[35] because the latter is a purely legislative function, as has been demonstrated. The governor can determine whether a state of insurrection exists and the necessity for military action, and his decision in this respect is conclusive. The arrest of inciters and leaders of insurrection can be justified as necessarily incident thereto; it is possible that their detention may be likewise; but their punishment and the suspension of the habeas corpus most emphatically cannot be.[36] It is submitted that the extreme limits of executive power are bounded by the merely possible detention. A trial on the return to the writ brings out the true facts and the innocent citizen is protected.

The governor's declaration of martial law is no more than a warning to citizens that "the military powers have been called upon by the executive to assist him in the maintenance of law and order, and that, while the emergency lasts, they must, upon pain of arrest and punishment, not commit any acts which will

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[32] See note 13, *supra*.
[33] In re Fire, etc., Commrs., 19 Colo. 482, 503, 36 Pac. 234.
[34] Ex parte McDonald, 49 Mont. 454, 143 Pac. 947, 954.
[35] *Ibid.* [36] *Ibid.*

in any way render more difficult the restoration of order and the enforcement of law." [37]

It is apparent that the alleged right of the executive to declare martial law [38] and the clause providing that the writ of habeas corpus shall never be suspended are in direct conflict and incompatible if the power to declare martial law implies the power to suspend the privilege of the writ.[39] Of course if we could define 'martial law' to be something other than the will of the military commander, the problem would be comparatively easy, but, as will appear, martial law is no law, a substitute for law and hence can hardly be modified. Besides, the important thing is practical operation, and differences in words mean little.

The Logical Result.

It can be plausibly argued that the writ must in any event be upheld as it is a rule of construction that a specific provision of a constitution [40] is not repealed by implication by another provision of the same constitution,[41] but this argument has received comparatively little attention from the courts.

In the face of these two provisions of which the express words of one are in conflict with the power claimed as the result of

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[37] Willoughby, Const. Law, p. 1233.

[38] "Martial law is the law of military necessity in the actual presence of war. It is administered by the General of the Army and is in effect his will." U. S. *v.* Diekelman, 92 U. S. 520, 526, 23 L. Ed. 742, 745. In England the only kind of martial law known is that which "constitutes a growth" on the common law which recognizes the doctrine of necessity, and will hold every act justifiable which is essential to the preservation of property and life. If this is true where individuals are in question, it applies *a fortiori* when the country is menaced with invasion, or an attempt is made forcibly to overthrow the government upon which the welfare of all depends. Under these circumstances force must be repelled by force; and everything will be lawful which is necessary to render the use of force effectual. A large part of the present confusion in the cases is due to the use of the term martial law interchangeably as it exists under the common law and as it has elsewhere existed, as in the case of military government. 2 Hare, Am. Const. Law 954, 957. See minority opinion of Chief Justice Chase in Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281.

[39] Ex parte Field, 5 Blatch. 63.

[40] The habeas corpus shall never be suspended, etc.

[41] Ex parte Moore, 64 N. C. 808.

the other, it is of advantage to go outside of the two sections in question, and look to statutes declaratory of them, if any, and to other parts of the Constitution, having always in view the fact that both provisions must be effectuated if possible, i. e., the writ upheld and likewise the power of the executive to repel invasion and suppress insurrection.

At this point we meet with the constitutional fiat:

"The military power shall always be in strict subordination to the civil power." [42]

There are also statutes present in nearly every state to the effect that the executive shall order the National Guard to repel invasion and suppress insurrection, providing, that in case of emergency the commanding officer of any part of the guard stationed at the scene of trouble may assemble his command, and after taking steps to notify the governor, aid the civil officers in repelling invasion or in suppressing insurrection.[43]

Further, in cases of tumult, riot, mob acting together to commit a felony or to break and resist the law, the power of the executive is limited to ordering the militia "to aid the civil authority to suppress such violence and to support the law." [44] Obviously these statutes go upon the theory that the civil authority is supreme, and that the military power is subordinate even in cases of invasion and insurrection.[45] *A fortiori* in case of an industrial disturbance confined to one or more subdivisions of

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[42] See note 14, *supra*.

[43] Mills' Ann. Sts., of Colo., 1912, § 4828.

[44] *Ibid*, § 4829.

[45] The instructions of Washington to his officers in the rebellion in Western Pennsylvania, were as follows:

"That every officer and soldier will constantly bear in mind that he comes to support the laws, and that it would be peculiarly unbecoming in him to be, in any way, the infractor of them; that the essential principles of a free government confine the province of the military, when called forth on such occasions, to two objects: first, to combat and subdue all who may be found in arms in opposition to the national will and authority; secondly, to aid and support the civil magistrates in bringing offenders to justice. The dispensation of this justice belongs to the civil magistrates; and let it ever be our pride and our glory to leave the sacred deposit there inviolate." 5 Irving's Life of Wash., Ch. 25, quoted in Griffin *v.* Wilcox, 21 Ind. 370, 384.

the state, this principle not only should be, but could be, observed. A strike is one phase of a controversy between employer and employee. Rebellion and invasion are specifically directed against the general public, which includes all elements of the population—the state. Given the requisite force peace officers can handle the situation in case of a strike. For instance observe the strikes in our large cities controlled by the police, representative of civil authority.

If the military is used in *aid* of the civil power, the latter will always be adequate to the limit of the military power of the state. In such case what is gained by the declaration of martial law and the suspension of the writ of habeas corpus, as long as the courts, sustained by the full strength of the civil power, which coincides with the limit of the military power, are adequate to the performance of their functions? The statement of the proposition furnishes its own answer. In this connection the distinction between a strike—civil discord—and actual warfare should be kept in mind.

If the habeas corpus can only be suspended by the legislature, and the military power is *always* to be in *strict subordination* to the civil power, the result is that the military power can only act in *aid* of the civil power; and this is recognized by the statutes cited. The habeas corpus clause of the various constitutions leaves the possible gap of rebellion or invasion. The word *always* in the provision in regard to the subordination of the military power rounds out the circle, and leaves no loop-hole for the intrusion of any martial law that can suspend the writ.

As an *aid* to the civil power the military is not only subordinate thereto, but accomplishes the end sought insofar as it can be accomplished by the use of the State's own force under any circumstances. This construction is sound in principle and sustained by high authority.[46] In this view of the matter the military are merely a body of armed police with the ordinary powers

[46] Ela *v.* Smith, 5 Grey (Mass.) 121 (1855); Johnson *v.* Jones, 44 Ill. 142; Franks *v.* Smith, 142 Ky. 232, 134 S. W. 484 (1912); Ex parte McDonald, 49 Mont. 454, 143 Pac. 947, 949. This is practically the situation under the common law in England. 2 Hare, Am. Const. Law, 957, citing Dicey. See Willoughby, Const. Law, p. 1233.

of police officers.[47] It might be objected that if the civil authorities of the particular subdivision are friendly to the strikers, lawlessness could never be quelled by the military acting as an aid to the civil authorities with the latter in control. Suffice it to say that the governor need not place the military at the disposal of the civil authorities,[48] but he may directly control their operations through military channels as an aid to the civil authorities, and he is the judge of which course to pursue.[49] Neither does he have to wait until called upon by the civil authorities.[50]

The following premises have therefore been established:

(1) The writ of habeas corpus can be suspended only by legislative action; never by the executive.

(2) The military power must at all times, even in invasion and insurrection be subordinate to the civil; *a fortiori* in suppression of lawlessness merely local.

(3) In consonance with the foregoing the military power of the state can be used only in aid of the civil, the military having the status of peace officers.

In regard to the entire proposition an inspection of the cases will reveal the fact that the courts have always been as patriotic and as prompt to vindicate the right as any military officer or any military tribunal can be or has been. In fact the courts have always justified the military to the extreme extent of the law.

Older Cases.

In view of the premises what have the courts held? The older cases heretofore cited have followed the law, and the general trend has been in the direction indicated till 1899. While in some instances they have not in so many words held that the military is an aid to the civil authority, they have in every case held that the writ of habeas corpus cannot be suspended except by the legislature. Nowhere is the principle more succinctly stated than in

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[47] Franks *v.* Smith, *supra.*

[48] *Ibid.*

[49] *Ibid.*

[50] *Ibid.* Ex parte McDonald, *supra.*

the North Carolina case of Ex parte Moore,[51] involving the Ku Klux Klan. The governor had declared the County of Alamance to be in a state of insurrection and had taken military possession. It was argued on the return of the writ by the military officer in command that the writ had been ipso facto suspended by the declaration of martial law. The Constitution of North Carolina provided that the writ could not be suspended, and made no exception even as to rebellion or invasion.[52] The court held that an express provision of the constitution could not be abrogated by implication by another provision, but the two should be harmonized, which was done by requiring the persons arrested by the military to be surrendered for trial to the civil authorities on habeas corpus.[53] This decision was rendered during the period of reconstruction in the face of conditions as arduous as any that have ever confronted a state in this country from any cause.

The cases previously cited follow the same general principle as hereinbefore indicated. Ex parte Milligan,[54] the leading American case will be discussed later in connection with the West Virginia cases. In the course of twenty-five years conditions have changed, and the courts with them. What follows?

LATER CASES.

Idaho.

The leading case in Idaho is the case of In re Boyle.[55] In the

[51] 64 N. C. 802, 808.

[52] This is immaterial, in view of the fact that only the legislature can suspend, and it did not suspend the writ in the cases discussed elsewhere herein.

[53] In part the court said: "I declare my opinion to be, that the privilege of the writ of habeas corpus has not been suspended by the action of his Excellency: that the Governor has power, under the Constitution and laws, to declare a county to be in a state of insurrection, to take military possession, to order the arrest of all suspected persons, and to do all things necessary to suppress the insurrection, but he has no power to disobey the writ of habeas corpus, or to order the trial of any citizen otherwise than by jury. According to the law of the land, such action would be in excess of his power." 64 N. C. 802, 808.

[54] 71 U. S. 1.

[55] 6 Idaho 609, 57 Pac. 706, 45 L. R. A. 832, 96 Am. St. Rep. 286.

nineties the state was reft by trouble with the metalliferous miners in the ill-famed Coeur De'Alene District. Martial law had been declared and the military were in possession. A man by the name of Boyle was taken into custody, and he applied for a writ of habeas corpus. We may assume that Boyle was an inciter of the 'insurrection,' although the case as reported is almost barren as to facts. The court, without the citation of a single authority, went to the length of holding that the governor *or military officer in command,* for the purpose of suppressing the so-called insurrection or rebellion *might suspend the writ of habeas corpus or disregard it if issued.* The decision is based on the necessity of self-preservation as regards the government, and the self-defense necessarily accompanying. The slight reasoning indulged in is to this effect. It is probable that could authorities have been cited in support of the position taken, they would have been.

There is nothing in the opinion to indicate that the courts were not open and in operation at the time the writ was prayed for. But even if not, to open them "is a part of the duty devolving upon the military." [56] On the face of the return the writ was refused. The detention of Boyle might have been justified on the ground of necessity by a showing that he was an inciter or leader of insurrection had a trial been had; [57] but as the case stands he might equally have been the most upright and loyal citizen in the state. Under this decision an innocent party can be deprived of constitutional rights and be imprisoned without a hearing. Even the guilty are entitled to that much. Thus, in the face of authority, a step repeatedly discountenanced by the courts of this country, both federal and state, during the entire period of our national life, was taken by a court which had evidently lost its perspective because home troubles were held too close to its eyes.

Pennsylvania.

Equally pernicious as regards deprivation of the citizen's liberty without a hearing is the Pennsylvania doctrine. In the

[56] Ex parte McDonald, 49 Mont. 454, 143 Pac. 947.

[57] See Ex parte McDonald, 49 Mont. 454, 143 Pac. 947, et seq.

leading case [58] in that state, the facts were as follows: The militia was called out under the usual proclamation by the governor that an insurrection existed. Wadsworth, a private in the militia, acting in obedience to the orders of his superior, shot down and killed a man who had refused to halt on command. Upon his arrest after the return of his regiment from service, a writ of habeas corpus was sued out for his release. The suspension of the writ was not directly involved, the only question before the court being Wadsworth's liability for the killing. The court found that a private soldier is bound to obey any order of an officer which does not clearly show on its face its own illegality, and Wadsworth was properly discharged.[59] In addition, however, the court took occasion to create a "qualified martial law" in which *the authority of the civil officers is subordinated to that of the military.* In this view it naturally follows that the habeas corpus is suspended as to any person taken in custody by the paramount military officers. Since their will is law as regards the public peace, under the "qualified martial law" in question, "which exists only as to the preservation of the public peace and order, not for the ascertainment of private rights, or the other ordinary functions of government." [60]

Suppose the predominant military authority imprisoned an innocent person and gave as a reason the necessary preservation of public peace and order, in return to the writ of habeas corpus. What redress would the prisoner have? None, in spite of the fact that the court would certainly be somewhat embarrassed to draw the line of distinction between private rights and public peace and order.

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[58] Com. ex rel. Wadsworth *v.* Shortall, 206 Pa. 165; 55 Atl. 952; 65 L. R. A. 193.

[59] If power be exercised for purpose of oppression or injury wilfully done, person giving order would be answerable. Luther *v.* Borden, 7 How. 1, 12 L. Ed. 581, 600. This case arose out of Dorr's Rebellion, in which the legislative department of Rhode Island suspended the writ. See also McCall *v.* McDowell, *supra.* See Mitchell *v.* Harmony, 13 How. 155, 14 L. Ed. 75, as to the standards by which the military are to be judged.

[60] Com. ex rel. Wadsworth *v.* Shortall, 206 Pa. 165, 55 Atl. 952, 956, 65 L. R. A. 193, 200.

It is obvious that if the court had heeded the constitutional mandate to keep the military in subordination to the civil power no such exigency could arise. As an *aid* to the civil power the military could exercise in practice whatever actual force was necessary. The court apparently labors under the delusion that to subordinate the military power to the civil means to have the military stand helplessly by while the civil authorities are overridden. If the militia act as peace officers there is no reason to anticipate such a result, as sufficient police protection is a guarantee against lawlessness.

As has been stated martial law is the law of necessity, the will of the general of the army "who may punish with or without trial, for crimes either declared to be so, or not so declared, by any existing law or by his own orders." [61] In fact martial law means no law at all.[62] Query: How can no law at all be modified and still retain its character of martial law, or no law at all? A great part of the confusion in the cases is due to the failure of the courts to use the term "martial law" accurately.

Colorado.

It cannot be said that the Supreme Court of Colorado has gone as far as the Idaho court or further than the Pennsylvania court. It has merely added a variation in holding that the civil power is subordinate to the military in certain circumstances. The Colorado doctrine is set forth in the case of In re Moyer.[63] Moyer was arrested during a strike of the metalliferous miners after a declaration of martial law by the governor and a proclamation that an insurrection existed, etc. The return to the writ of habeas corpus recited that Moyer had been arrested for aiding and abetting the insurrection. The court held that it was for the governor to determine when an insurrection existed, which determination was conclusive; that any person aiding or abetting such insurrection could be arrested and detained until the suppression of the insurrection, at which time he would be turned

[61] In re Egan, 5 Blatch. 319, 322.
[62] *Ibid*, p. 322, quoting Lord Wellington.
[63] 35 Colo. 159; 85 Pac. 190; 12 L. R. A. (N. S.) 979.

over to the civil authorities; that previous thereto he would not be released by the courts on habeas corpus.

The fact that the habeas corpus is necessary for the protection of citizens not involved in the strike is overlooked. Any person could be arrested and kept in prison indefinitely by the military commander until the so-called insurrection was suppressed, even though he might be the most innocent of men. The Constitution provides that no man shall be imprisoned without legal cause, and that the civil power shall always be paramount. An actual condition exists, sanctioned by the judiciary, in which a citizen may languish in prison for any reason that may appeal to the commanding military officer. The length of his imprisonment is measured by the duration of the insurrection, which latter is limited by the judgment of the governor as to the facts. It is entirely possible that the person may be justifiably detained. It is equally possible under such a state of the law that his detention may be unjustified, and it is the latter contingency which constitutes the danger.

In that part of the opinion in this case dealing with the suspension of the writ of habeas corpus the usual plea of necessity, is advanced.

West Virginia.

> "May citizens accused of civil offenses be tried, sentenced, and imprisoned or executed, at the will of the governor of this State, notwithstanding civil courts having jurisdiction of the offenses are open?"

With these striking words Judge Robinson of West Virginia begins his dissenting opinion in Ex parte Jones,[64] which was the companion case of State ex rel. Mays and Nance *v.* Brown.[65] Mays and Nance had been convicted by a military commission and were serving sentences of three and five years respectively for misdemeanors punishable by the civil law with a maximum imprisonment of one year. Jones sought her release from detention to which she had been committed by the same authority. The petitioners were remanded, as it was held that the military

[64] 71 W. Va. 567, 77 S. E. 1029, 45 L. R. A. (N. S.) 1030.
[65] 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. (N. S.) 996.

was predominant in that part of the State declared by the governor to be in a state of insurrection and their action was conclusive.

The court reached its decision in the face of constitutional provisions forbidding the suspension of the habeas corpus, with no exceptions for invasion and insurrection;[66] in the face of a provision that the military should *always* be subordinate to the civil power; and in the face of a provision that no citizen, unless engaged in the military service of the state, should ever be tried or punished by any military court for any offense cognizable by the civil courts.[67] The theory of the decisions is that the people did not intend to abolish a generally recognized incident of sovereignty, the power of self-preservation by the use of the military. The court applies the rules of actual warfare, which latter cannot legally exist, for reasons heretofore stated. Therefore the court in effect holds that the necessity attendant on martial law justifies the creation of the military commission and its action, and petitioners are not deprived of liberty without due process of law, as they have been tried by the predominant authority.

Use of the militia as an aid to the civil authorities was vigorously contended for by Judge Robinson, but the majority were unable to recognize either the soundness of the contention or the practical efficiency of the method.

These decisions are in direct conflict with the language used in Ex parte Milligan,[68] the leading case in the United States on the general subject of martial law and military commissions. This case came up just after the Civil War, and it may well be thought that the pressure on the minds of the judges to do the expedient thing and leave principle and sound law for pleasanter and more equable times was equally as great as the strain on the West Virginia court in the presence of an industrial disturbance.

The facts were that Milligan, a citizen of Indiana, was tried and sentenced to death by a military commission in that state on the charge of conspiracy against the government, inciting insurrection, etc. A writ of habeas corpus was issued and Milli-

[66] Const. of West Virginia, Art. III, § 4.
[67] *Ibid.*, Art. III, § 12.
[68] 71 U. S. 2, 18 L. Ed. 281.

gan was ordered to be turned over to the civil authorities for trial. The court said in part:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority." [69]
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> "One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.
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> Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offenses charged, provided for their punishment, and directed that court to hear and determine them. And soon after this military tribunal was ended, the circuit court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgment." [70]
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> "It is claimed that martial law covers with its broad mantle the proceedings of this military commission." [71]
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> "The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guaranty of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the

[69] 71 U. S. 2, 120.
[70] 71 U. S. 2, 122.
[71] 71 U. S. 2, 124.

> King of Great Britian was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable and, in the conflict, one or the other must perish." [72]
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> "It follows from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." [73]

The Constitution of West Virginia contains every provision construed by the Supreme Court in the foregoing case, with the exception that the provisions of West Virginia are somewhat more emphatically worded. Verily, no plainer meaning can be gotten out of English.

The theory of necessity which looms up in the West Virginia opinion is, according to Justice Davis, the writer of the opinion in the Milligan case, fallacious. Under the provisions of the West Virginia Constitution the preservation of the state is secure, for its military power is as great and as effective as an aid to the civil authorities as under any other circumstances. Necessity itself, in the circumstances, is no justification and the experience of history show that the same results can be achieved without having recourse thereto. Experience further shows that the liberty of the people is safest when courts follow the law instead of making it—for the law is the law, and when courts rewrite it to meet strained conditions confusion worse confounded results.

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[72] 71 U. S. 2, 124.

[73] 71 U. S. 2, 127.

Kentucky.

It is refreshing to note that even when the times appear to be out of joint some courts maintain their perspective. In the late Kentucky case of Franks *v.* Smith,[74] the right of the citizen to be free from imprisonment except for cause is vindicated in a striking manner. The case arose out of "night rider" troubles. Smith brought suit for damages for false arrest against Franks, a sergeant in the militia, and several of his companions. The case is devoted to a consideration of the rights and liabilities of militiamen while engaged in aiding the civil authorities. Franks' defense was that he and his companions had been ordered to arrest all persons traveling on the highway at unusual hours of the night in companies of more than two; that Smith and four companions were stopped after 10 p. m.; a pistol was found in Smith's buggy and he was arrested. It appeared that Smith was peaceably traveling and that Franks and his companions were acting in obedience to orders of their superior officers, the militia having been regularly ordered into active service by the governor.

The court, considering the usual constitutional provisions, held that the governor could only call out the militia and direct it *in accordance with law;* that he could call them out at any time and place he considered their presence necessary; that "we have not, and cannot have, in this state a military force that is not and will not be subordinate to the civil authorities. * * * The military in active service and in every emergency that arises in such service is subordinate to civil power."[75] The court specifically refuses to agree with the Colorado doctrine "that in certain emergencies the civil law may be suspended by military orders," and with the Pennsylvania doctrine. The Idaho case is not even mentioned. The court recognizes the necessity of maintaining the supremacy of law and order and says that this can be accomplished by the use of the militia as an aid to the civil authorities. "The military of the state are in truth peace

[74] 142 Ky. 232, 134 S. W. 484, Ann. Cas. 1912D, 319.

[75] Franks *v.* Smith, 142 Ky. 232, 242, 134 S. W. 484, 488, Ann. Cas. 1912D, 319, 323. See Willoughby, Const. Law, p. 1242, on the general subject.

officers. The purpose of their existence is to preserve the peace and quiet of the state in its broadest sense, and when this has been done the life and property of the citizen is secure." [76]

A verdict for $1,000 in favor of Smith against Franks was affirmed.

It follows that the writ of habeas corpus can never be suspended by the executive under the Kentucky doctrine. This, of course, is because its suspension is by force of military supremacy and martial law which cannot exist where the military is subordinate to the civil power.

The foregoing case speaks for itself. Disorder was suppressed and the state still lives without necessity having been recognized as an adequate reason for the suspension of constitutional guarantees. The adequacy of law is demonstrated by an adherence to sound principles of construction. On the other hand, "where there is no vision the people perish."

Montana.

In the leading Montana case, Ex parte McDonald,[77] the facts were as follows: The governor declared that a state of insurrection existed and proclaimed martial law in a certain section of the state. McDonald and others were arrested by the militia upon the charge of being the inciters of the insurrection, and they were detained to prevent their further participation in fomenting and keeping alive this condition of insurrection. In regard to one of the petitioners, Gillis, the question was squarely raised as to whether the governor could authorize military tribunals to try citizens and thus suspend the writ. This question was answered in the negative. The court held in addition that the military force were a sort of major police for the restoration of the public order, and stated further than "under this theory the arrest and detention, under the circumstances stated, can be justified and must be upheld."

The court specifically declined to follow the West Virginia cases, and made a distinction between insurrection and war which

[76] Franks *v.* Smith, 142 Ky. 232, 253, 134 S. W. 484, 493, Ann. Cas. 1912D, 319, 328.

[77] 49 Mont. 454, 153 Pac. 947.

has been previously noted. It was held that the suspension of the habeas corpus was a legislative function, and stated that "if the power to suspend that writ must stand or fall with the power to establish absolute martial law, the inference is inevitable that no such regime can be established by the executive." The court draws a distinction between absolute martial law and that kind of martial law which exists, when a governor has declared that a state of insurrection exists, and holds that the latter will justify the arrest and detention of persons if necessary to suppress the insurrection. No complaint can be made with the soundness of this proposition, as it is based upon difference in circumstances, not a difference in words, although the accuracy of using the term martial law in more than one sense can be justly questioned.

The court's action, however, is such that the liberty of the law abiding citizen was protected, in that a trial was had at once and the real facts in regard to each petitioner ascertained. It will be recalled that the decisions heretofore discussed were based entirely on returns to the writ, and not on facts brought out by a trial. The decision of the Montana court is to be commended as another example of sound legal construction which adequately meets arduous conditions. The court was neither timid nor hasty.

CONCLUSION.

The only object in the suspension of the habeas corpus is the necessity for making effective measures designed to restore law and order—in other words the real consideration is the necessity of the case.

If the requisite effectiveness can be secured without doing violence to constitutional provisions whose meaning is beyond doubt, then the reason for the suspension of the writ vanishes. The method pointed out whereby the military arm of the state is used as police is certainly sound in theory, and is based on an unstrained and logical construction of the provisions involved, whereby each provision is effectuated and given force. Any other construction violates some provisions and nullifies others, as must obviously occur when the writ is held to be suspended by the executive who subordinates civil to military power.

The question is, does the method advocated work in practice? "The life of the law is not logic but experience," says Justice Holmes in his History of the Common Law. Experience shows that those states which have followed the construction contended for have controlled their domestic troubles without the disruption of law, and a consequent reign of force based on a necessity no more real in one case than in another. When logic and experience, theory and practice, coincide, it is submitted that the result is sound—and the result which upholds the habeas corpus is vitally necessary, because "the habeas corpus secures every man here, alien or citizen, against everything which is not law, whatever shape it may assume." [78]

A state may be likened to a human being in some respects. If the methods invoked for the destruction of an external and alien enemy, are used in the treatment of an internal trouble the actor is just as apt to destroy himself in the second case as the external enemy in the first. The resulting credit to intelligence is not great.

There is a quality for which we have no specific word which is embodied in the expression that a man or a people in any crisis will react consistently with his or their training and traditions. Loyalty to our ideals and traditions requires that there should *always* be a method at hand whereby in no particular case can a citizen be deprived of his liberty without just cause—that as to this Republic justice should cover "with the protecting shield of the law the weakest, the humblest, the meanest, and until declared by solemn law unworthy of protection, the guiltiest of its citizens."

Wm. W. Grant, Jr.

DENVER, COLORADO.

[78] Letter of Jefferson to A. H. Rowan, Monticello, Sept. 26, 1798. See also letter to Madison dated Paris, July 31, 1788. Writings of Thos. Jefferson, Vol. 7, p. 97, in which he maintains that the habeas corpus should not be suspended in cases of insurrection and rebellion.